Supreme Court, U. S.
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No. 78-1711

IN THE

Supreme Court of the United States

October Term, 1978

JEFFREY ROBERT MALLEK,

v.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL DISTRICT COURT NUMBER TWO OF DALLAS COUNTY, TEXAS

BRUDER, COOPER, McCOLL
& PRESTON
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IN THE

Supreme Court of the United States

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JEFFREY ROBERT MALLEK

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THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL DISTRICT COURT NUMBER TWO OF DALLAS COUNTY, TEXAS

Jeffrey Robert Mallek, petitioner, prays that a writ of certiorari issue to review the order of the Criminal District Court Number Two of Dallas County, Texas entered in this case on October 13, 1978.

OPINION BELOW

There is no written opinion of the Criminal District Court Number Two of Dallas County, Texas, other than the order of October 13, 1978, a copy of which is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

Although this petition is not timely filed, see Rule 22(1) of the Rules of this Court, such untimely filing is not jurisdictional and does not preclude this Court from exercising discretion to hear this case. Durham v. United States, 401 U.S. 481 (1971); Taglianetti v. United States, 394 U.S. 316 (1969). Because most of the delay in filing this petition was caused by a delay in the preparation of the transcript of the petitioner's trial on the part of the court reporter who reported the trial (which delay was not caused by the petitioner),[1] and because this case presents an important and serious issue which needs to be resolved by this Court, the Court should exercise its discretion to hear this case and should issue a writ despite the untimeliness of the filing of this petition.

QUESTION PRESENTED

Whether the evidence supporting the petitioner's conviction was seized in violation of the Fourth Amendment, applicable to this case under the Fourteenth Amendment, as construed in South Dakota v. Opperman, 428 U.S. 364 (1976).

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[1] On October 13, 1979 the petitioner requested the court reporter who reported his trial to begin preparation of the transcription of his notes of the trial. On January 15, 1979, after being advised by said court reporter that the transcription had not been completed, the petitioner filed an application for extension of time for filing this petition, a copy of which is attached hereto as Appendix B. The undersigned counsel was advised by a telephone call from the Clerk's office that the application was being returned because it was untimely filed, but was advised to attach a copy thereof to this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No State shall . . . deprive any person of . . . liberty . . . without due process of law; . . .

STATEMENT OF THE CASE

Course of Proceedings Below

The petitioner was indicted by the Dallas County grand jury on May 8, 1978 for the unlawful possession of hashish on or about January 5, 1978. On June 6, 1978 the petitioner filed a motion to suppress evidence, seeking suppression of the hashish which formed the sole basis of the indictment. A hearing was held on the petitioner's motion on June 19, 1978. Following the submission of memoranda by the prosecution and the petitioner, the court denied the motion to suppress on July 28, 1978. On September 15, 1978 the petitioner plead 'not guilty' to the indictment and was tried before the court, a jury having been waived. Based on the testimony adduced at the motion to suppress hearing,

the trial court found the petitioner guilty and passed the case to October 13, 1978 for the assessment of punishment. On October 13, 1978 the trial court withdrew his prior finding of guilt and substituted a finding that the evidence substantiated the petitioner's guilt. The court then deferred further proceedings without adjudicating the petitioner's guilt and placed the petitioner on two (2) years probation, pursuant to Tex.Code Crim. Pro.Ann.art. 42.12§3d(a)(Vernon 1979).[2] No appeal was taken to a higher state court because no appeal is authorized under Texas law from a deferred adjudication.[3]

Facts Relevant to the Question Presented

In the early morning hours of January 5, 1978 the petitioner, while driving a 1974 Oldsmobile, was involved in a one-car accident within the city of Dallas, Texas. He apparently lost control of his car and struck a utility pole before coming to rest near a wall on the side of the street. Dallas police officers C.J. Watner and J.L. Morris went to the scene of the accident in response to a police dispatch and there confronted the petitioner. SF[4] 4-10. After talking with ambulance attendants at the scene and after speaking with the petitioner the officers concluded that the petitioner was intoxidated. They arrested the petitioner and placed him in their squad car. SF 10-12. The officers then "called for a wrecker to come and get [the petitioner's car] and then [they] did an inventory search of the car" at the scene. SF 12-13. Between the two separate front seats Watner found a medium sized brown paper bag which he opened. It contained a plastic bag, which he also opened, and found therein a hand-rolled cigarette and a piece of aluminum foil, approximately one inch square and flat. SF 16. Watner unfolded the piece of aluminum foil, "look[ed] inside" and found the hashish which forms the basis of the petitioner's case. SF 17.

With respect to the impoundment of the petitioner's car, Watner testified that it had to be impounded "according to State law", SF 12, in order to "keep the streets clear at all times", SF 29, and further stated that impoundment was required under a general order issued by the chief of police of the city of Dallas. SF 30. Watner did not know the number of such general order and could not recite the contents of such general order. SF 30. He could only say

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[2] Sec. 3d(a) provides:

> When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may prescribe not to exceed 10 years. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

[3] Article 42.12, § 3d(b) provides that an appeal may be taken in a deferred adjudication proceeding only after there is an adjudication of guilt. This provision is consistent with the opinions of the Texas Court of Criminal Appeals that no appeal may be taken in a case where no judgment of guilt has been entered. Tyra v. State, 548 S.W.2d 912 (Tex.Crim.App. 1977); Bruder & Helft, *Appeals in Texas Criminal Cases,* 13 Hous. L. Rev. 324, 327-28 (1976).

Since no judgment was entered in this case, the petitioner was precluded under Texas law from appealing his case to the Texas Court of Criminal Appeals.

[4] "SF" refers to the "Statement of Facts – Motion to Suppress Hearing" which is the transcription of the court reporter's notes taken during the June 19, 1978 hearing held in this case on the petitioner's motion to suppress.

that based on what he was told the general order required officers to impound any vehicle when the driver of the vehicle is taken into custody and there is no one at the scene to whom the vehicle can be released. SF 31-32. The prosecution did not introduce any written instrument establishing the police department policy regarding impoundment to which Watner alluded in his testimony.

Regarding the inventorying of vehicles, Watner testified that it is a city policy to conduct an inventory of any vehicle that is impounded. SF 14. He stated that such policy was based on general orders promulgated by the chief of police of the city of Dallas, SF 30, 32-33, but was unable to identify the general order regarding the inventorying of impounded vehicles by number and was unable to recite the contents of such general order. SF 33. Watner stated that what he knew about such general order was "what [he] remember[ed] . . . [from] when [he] was in the Academy, and . . . what [his] trainers told [him]", SF 33, what he learned from his daily police experience and what other officers told him. SF 34. He further stated that a Dallas police officer could be as thorough as he wanted to be in conducting an inventory of a vehicle and that each officer had wide discretion in implementing the 'policy' requiring an inventory of impounded vehicles. SF 34-35. With respect to the opening of a closed container found in a vehicle in the course of an inventory, Watner testified that the general orders allow an officer total discretion as to whether the container should be opened, searched and its contents inventoried, or whether the closed container should be inventoried as a 'closed container'. SF 36-37. The prosecution did not introduce the written general order regarding the inventorying of vehicles to which Watner alluded in his testimony.

Regarding his reason for opening the brown paper bag, Watner testified that he searched it becasuse he "believed there was contraband in it". SF 42. His candid admission is clearly supported by the facts and the inferences to be drawn therefrom in that Watner did not open and search numberous other articles located in the interior of the vehicle; he singled out the brown paper bag for more thorough inspection only because he suspected it contained contraband.

REASONS FOR GRANTING THE WRIT

The primary reason for granting the writ in this case is to enforce this Court's decision in *South Dakota v. Opperman,* and to provide whatever explication of *Opperman* as may be necessary to ensure its proper application.

The petitioner advances two arguments in support of his conclusion that the seizure of the hashish in this case violated the Fourth Amendment, as construed in *Opperman.* First, that the inventory of the petitioner's car was not carried out in accordance with standard procedures established by the Dallas police department consistent with *Opperman;* in fact, the prosecution failed to establish the existence of a standard procedure consistent with *Opperman.* The inventory of the petitioner's car was the product of either a policy which conflicts with *Opperman* in that it vests totally arbitrary discretion upon individual officers, which is at odds with *Opperman,* or it was the product of the officer's individual caprice occurring in the absence of standard procedures mandated by *Opperman.* Second, that the seizure of the hashish was the product of a search which exceeded an *Opperman*-approved inventory and which, in the absence of probable cause to justify it, violated the petitioner's Fourth Amendment rights. The seizure of the

hashish occurred during a search based upon the searching officer's suspicion after the officer had satisfied the 'community caretaking function' which justifies an inventory.

A.

In *Opperman* the plurality opinion of the Chief Justice makes clear and certain the requirement that an inventory must be "carried out in accordance with *standard procedures* in the local police department" which "ensure[s] that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function" of an inventory, 428 U.S. at 375, and serves as evidence that the inventory was "not a pretext concealing an investigatory police motive". *Id*, at 376. Mr. Justice Powell, in his concurring opinion, expressed and amplified the same view in the following terms:

> . . . the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and *was conducted strictly in accord with the regulations of the Vermillion Police Department. Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles.*

Id, at 379-80. (Footnotes omitted.) (Emphasis added.) The United States Court of Appeals for the Ninth Circuit properly construed and applied *Opperman*, as regards the necessity for 'standard procedures', in United States v. Hellman, 556 F.2d 442 (1977), where a written police department regulation providing for the impoundment of vehicles in specific circumstances was introduced into evidence, but

no such written regulation covering inventory procedures was introduced. The court reversed the seizure of evidence from a vehicle "because the inventorying of impounded cars was not shown to be a routine practice and policy of *this* police department, as was the case in *Opperman.*" *Id*, at 444. The court's rationale was expressed thusly:

> . . . A locally followed practice gives some assurance that a particular car was not singled out for special searching attention. Absent such assurance some special reason for the taking of safeguarding or security precautions that are not customarily taken should exist if the intrusion resulting from the taking of such precautions is to be rendered reasonable under the fourth amendment.

Id. The *Hellman* court construed the 'standard procedures' requirement of *Opperman* as being a requirement that each local police department have an established policy fixing standard procedures for the impoundment and inventorying of vehicles, and that the prosecution prove the existence of such standards by introducing the written regulation establishing such standards in much the same manner as the prosecution must establish the validity of a search upon which it relies. The court specifically rejected the notion that the 'standard procedures' mentioned in *Opperman* was an all-pervasive, national concept existing in all police departments in the absence of specific documents establishing such procedures. The *Hellman* court's holding is implicit in the *Opperman* plurality opinion and in Mr. Justice Powell's concurring opinion, and it is the only logical conclusion to be reached after evaluating the competing issues noted in *Opperman.* A written policy statement establishing standard procedures for impounding and inventorying vehicles is necessary to provide a yardstick by which to compare the local

policy with the minimal requirements of *Opperman* and to provide a yardstick by which to evaluate an officer's conduct in a given situation.

In this case there is no evidence of a routine practice and policy of the Dallas police department regarding the impounding and inventorying of vehicles. The prosecution never introduced any written policy statements establishing 'standard procedure', even though the testimony unequivocally shows that such a written policy exists. The failure to produce the written general orders renders it impossible to determine if the 'standard procedure' employed by the Dallas police department satisfies *Opperman's* requirements. This threshold omission by the prosecution requires a reversal of the petitioner's case under *Opperman*, and under the more explicit interpretation of *Opperman* in *Hellman*. Additionally, the only evidence of a 'standard procedure' existing in the Dallas police department which the prosecution adduced in this case was the testimony of officer Watner, which was secondary evidence – the general orders were the best evidence – and was hearsay, which, under Texas law (which this Court must apply in this case, Henry v. Mississippi, 379 U.S. 443, 446-47 (1965)), constitutes no evidence because it has no probative value. Lumpkin v. State, 524 S.W. 2d 302, 305-06 (Tex.Crim.App.1975). By failing to introduce the written basis for the 'standard procedure' governing the impoundment and inventorying of vehicles within the Dallas police department and by failing to introduce any competent evidence which might serve as a substitute for such writtent basis, the prosecution utterly failed to discahrge its burden of sustaining the seizure of the hashish. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

If credence is given to Watner's testimony regarding the Dallas police department's standard procedure, the inescapable conclusion is that there is no standard impoundment procedure and there is no standard inventory procedure consistent with *Opperman's* requirements. Watner's testimony

reveals that the Dallas police department's policy gives each officer discretion regarding impoundment; that it gives wide discretion to each officer as to the need to conduct an inventory; and that it gives each officer total discretion as to the scope of the inventory. The Dallas police department policy, as described by officer Watner, does not give any assurance that an inventory conducted by a Dallas police officer will be limited to the purposes for which it is permitted, or that it will not be a "general license for the police to examine all the contents of [an] automobile" without the necessity of Fourth Amendment protection. Under the Dallas police department policy as related by Watner, no inventory list enumerating the property found in the vehicle, such as the type used in *Opperman*,[5] is required, nor was a form used nor a list made in this case. The inventory practice used by Dallas police officers is not predicated upon a standard procedure, as required by *Opperman*. Such practice, as outlined by officer Watner, is wholly discretionary on the part of each individual officer and is unrestrained by any limitation consistent with the purposes of an inventory, as required by *Opperman*. The Dallas police department police, as described by officer Watner, is fraught with the potention denounced in *Hellman* because the unbridled discretion vested in the individual Dallas police officers allows them to single out a particular vehicle for special searching attention not required in order to satisfy the needs for an inventory,

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[5] The opinion by the Chief Justice notes that "a standard inventory form" was used by the Vermillion police. 428 U.S. at 366. Mr. Justice Powell more particularly noted the use of the standard form, consistent with the Vermillion police department's standard procedure. 428 U.S. at 380.

which officer Watner frankly admitted he did with the petitioner's car.

This Court should apply *Opperman* in this case to hold that the prosecution failed to establish the existence of a standard procedure covering the impoundment and inventorying of vehicles consistent with *Opperman's* mandate. This Court should also hold, if necessary, that the discretionary procedure outlined by officer Watner is, to the extent it can be called a 'standard procedure', violative of *Opperman.*

B.

The seizure of the hashish in this case is the product of either a bad faith inventory or a search outside the scope of a permissible inventory. If officer Watner was authorized to inventory the contents of the petitioner's automobile, his opening of the brown paper bag and especially his opening of the small piece of aluminum foil was not done in furtherance of the legitimate purposes of an inventory; Watner acted as he did to seek evidence of criminal activity and justified his action on the basis of his right to inventory because he lacked probable cause to act as he did. This is clear from his testimony that he opened the brown paper bag because he "believed there was contraband in it". SF 42. As stated in *Hellman,* where the seizing officer testified that one of his motives in inventorying the car was to justify an investigatory search. 556 F.2d at 443. Rejecting the contention that the motive of the seizing officer is irrelevant in an inventory situation, the court said:

> Here it is clear from the testimony of the searching officer that the citation, the impoundment and the inventorying all were for "an investigatory police motive". This alone is sufficient

> to conclude that the warrantless search of the car was unreasonable.

Id, at 444. (Footnote omitted.) To the extent that officer Watner used the right to inventory the petitioner's car as a basis to search the brown paper bag and the piece of aluminum foil, he acted in bad faith.

Equally as critical to a proper determination of this case is the issue of whether officer Watner's opening of the brown paper bag and of the piece of aluminum foil was within the proper scope of an inventory. *Opperman* defines the scope of an inventory as the limited intrusion into an impounded vehicle necessary to discharge the community caretaking function which justifies an inventory. 428 U.S. at 373-75 (plurality opinion) and at 379-80 (concurring opinion of Mr. Justice Powell). When an officer inventorying an impounded vehicle goes beyond the relatively simple effort required to list the unsecured contents of the vehicle and begins to seek evidence in places where it could have been concealed, he crosses the line demarcating a search permitted for the limited purposes of inventorying which requires no probable cause and a search for evidence of criminal activity which requires probable cause, United States v. Edwards, 577 F.2d 883, 893-94 (majority opinion), 897 (concurring opinion of Rubin, J., and dissenting opinion of Goldberg, J.) (5th Cir. 1978), and he must, in the absence of exigent circumstances, first secure a warrant. United States v. Chadwick, 433 U.S. 1 (1977); United States v. Johnson, No. 77-5634, 5th Cir., Jan 17, 1979. Where, as in this case, the officer is in exclusive possession and control of the place or thing to be searched (i.e., the petitioner's vehicle and the piece of aluminum foil), *Chadwick* applies.

Neither the opening of the brown paper bag nor the opening of the piece of aluminum foil was essential to carry out the community caretaking function imposed by *Opperman* as the sole justification for an inventory. Watner's actions of opening the bag and the foil were the type of acts specifically prohibited in Mr. Justice Powell's opinion and inferentially prohibited in the plurality opinion. The bag and foil should have been inventoried as "a brown paper bag" and "a piece of foil". Opening them and looking into them constituted a search independent of the right to inventory and required probable cause, which did not exist, and a warrant, which was not secured. See People v. Rutovic, 566 P.2d 705 (Colo. 1977); State v. Jewell, 338 So.2d 633 (La. 1976); State v. McDougal, 68 Wis.2d 399, 228 N.W.2d 671 (1975); People v. Grana, 185 Colo. 126, 527 P.2d 543 (1974); State v. Keller, 265 Or. 622, 510 P.2d 568 (1973); State v. Gwinn, 301 A.2d 291 (Del. 1973); Boulet v. State, 17 Ariz.App. 64, 495 P.2d 504 (1972); Mozetti v. Superior Court of Sacramento County, 4 Cal.2d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971); and People v. Denman, 19 Cal. App.2d 632, 97 Cal. Rptr. 23 (1971).

PRAYER

For the reasons stated herein the petitioner prays that this Court issue a writ of certiorari to review the order of the Criminal District Court Number Two of Dallas County, Texas, and that the Court reverse such order and remand the case for further proceedings.

Respectfully submitted,

BRUDER, COOPER, McCOLL
& PRESTON

706 Main Street, Suite 300
Dallas, Texas 75202

By: MELVYN CARSON BRUDER
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I, Melvyn Carson Bruder, counsel for the petitioner herein and a member of the Bar of this Court, hereby certify that on this the 25th day of April, 1979, I served one (1) copy of the foregoing petition upon the Honorable Mark White, Attorney General of the State of Texas, as counsel for the respondent herein, by mailing the same to him via United States mail in Dallas, Texas addressed as follows:

The Honorable Mark White
Attorney General of the State of Texas
Capitol Station
Austin, Texas.

MELVYN CARSON BRUDER

APPENDIX A

ORDER OF THE CRIMINAL DISTRICT NUMBER TWO OF DALLAS COUNTY, TEXAS ENTERED ON OCTOBER 13, 1978

APPENDIX A

ORDER OF PROBATION WITHOUT
ADJUDICATION OF GUILT
(PLEA OF NOT GUILTY)

MINUTES OF THE CRIMINAL DISTRICT COURT NO. 2
OF DALLAS COUNTY, TEXAS

NO. F-78-4271-NI

THE STATE OF TEXAS — OCTOBER TERM, A.D. 1978
VS. — OCTOBER 13, A.D. 1978
JEFFREY ROBERT MALLEK

ORDER

The defendant having been indicted in the above entitled and numbered cause for the felony offense of Unlawful Possession of a Controlled Substance, to-wit: Tetrahydrocannibinols, as charged in the indictment and this cause being this day called for trail, the State appeared by her assistant Criminal District Attorney JERRY BANK and the Defendant JEFFREY ROBERT MALLEK appeared in person and his counsel MEL BRUDER also being present and both parties announced ready for trial, and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of Dallas County, Texas, in writing, signed by him, and filed in the papers of this cause before the Defendant entered his plea herein, the defendant was duly arraigned and in open Court pleaded NOT GUILTY to the charge contained in the indictment; thereupon the defendant was admonished by the Court of the said consequences of

the said plea and the range of punishment prescribed by law and that the Court was not bound by any recommendation of the prosecutor regarding punishment, and the defendant persisted in entering said plea, and it plainly appearing to the Court that the defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him to confess his guilt, and that he entered said plea freely and voluntarily, the said plea was accepted by the Court and is now entered of record as the plea herein of the Defendant. The defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and any other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; and, the Court having heard the Defendant's waiver of the reading of the indictment, the defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion that the evidence submitted substantiates the defendant's guilt, and the Court being of the opinion that the best interests of society and the defendant will be served by deferring further proceedings without entering an adjudication of guilt;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the above named defendant be and is hereby placed on probation for a period of 2 years, such period of probation to begin and be effective as of the 13th day of OCTOBER, 1978, upon the following terms and conditions, to-wit:

(a) Commit no offense against the laws of this or any other State or the United States;

(b) Avoid injurious or vicious habits;
(c) Avoid persons or places of disreputable or harmful character;
(d) Report to the probation officer, as directed, to-wit: monthly;
(e) Permit the probation officer to visit him at his home or elsewhere;
(f) Work faithfully at suitable employment as far as possible;
(g) Remain within a specified place, to-wit: County, Texas; (COLLIN)
(h) Make restitution or reparation in any sum that the court shall determine.
(i) Support his dependents; and
(j) Pay a Probation fee of $10.00 per month to the Probation Officer of this Court on or before the 15th day of each month hereafter during probation.

/s/ DON METCALFE, JUDGE

This Order is entered pursuant to the provisions of Section 3d of Article 42.12, Code of Criminal Procedure of Texas, and is not a final adjudication of guilt.

APPENDIX B

APPLICATION FOR EXTENSION OF TIME FOR FILING PETITION FOR CERTIORARI

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

JEFFREY ROBERT MALLEK,
Petitioner

v.

THE STATE OF TEXAS,
Respondent.

APPLICATION FOR EXTENSION OF TIME
FOR FILING PETITION FOR CERTIORARI

TO MR. JUSTICE POWELL, CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

1. Pursuant to Rule 22, ¶ 1 of the Rules of this Court, application is made for an extension of time to file a pe-

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[1] Article 42.12 § 3d(a), reads as follows:

> When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may prescribe not to exceed 10 years. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

tition for a writ of certiorari, to and including March 8, 1979.

2. This Court's jurisdiction is based on 28 U.S.C. § 1257(3).

3. This is a state criminal case wherein the petitioner was convicted in the Criminal District Court No. 2 of Dallas County, Texas in Cause No. F78-4271-NI of the unlawful possession of tetrahydrocannabinol. Following a bench trial on September 15, 1978 the state district judge found the defendant guilty and continued the case for preparation of a pre-sentence investigation. On October 13,1978 the state district judge withdrew his finding of guilt and, pursuant to TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3d(a) (Vernon Supp. 1978),[1] found that the evidence substantiated the petitioner's guilt, but deferred further proceedings without entering an adjudication of guilt, and placed the petitioner on probation for a period of two years. Texas law does not provide for an appeal from proceedings had pursuant to article 42.12, § 3d(a).

4. The sole issue which will be presented for review involves the validity of the search of the petitioner's automobile. Petitioner has appended hereto a copy of the brief which he filed in the trial court in support of his motion to suppress; the brief sets out the essential facts of the case.

5. This request for extension of time is made necessary primarily because the court reporter in the state district court has not transcribed his notes of the hearing held on the petitioner's motion to suppress and his notes of the petitioner's bench trial, even though the undersigned counsel requested him to do so more than 60 days ago. Said court reporter advised the undersigned counsel earlier this month that his notes pertaining to the petitioner's case would be

transcribed by January 20, 1979. Although the undersigned counsel has completed most of the research necessary to prepare and file a petition for a writ of certiorari on the petitioner's behalf, completion of the essential research and final preparation of the petition cannot be done until the court reporter's notes have been transcribed and furnished to counsel.

6. The requested extension will in no way adversely affect the concern of the State of Texas in this case, nor will the extension unduly delay this Court's consideration of the petition in this Term.

WHEREFORE, the petitioner requests that the time for petitioning be extended to and including March 8, 1979.

Respectfully submitted,

BRUDER, COOPER, McCOLL
& PRESTON
706 Main Street
Suite 300
Dallas, Texas 75202

By: /s/ Melvyn Carson Bruder
MELVYN CARSON BRUDER

APPENDIX C

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

APPENDIX C

IN THE CRIMINAL DISTRICT COURT
NO. TWO OF DALLAS COUNTY, TEXAS

No. F78-4271-NI

THE STATE OF TEXAS

v.

JEFFREY ROBERT MALLEK

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Comes now JEFFREY ROBERT MALLEK, defendant in the above styled and numbered cause, and files this brief in support of his motion to suppress evidence previously filed herein.

I

Summary of Testimony at Suppression Hearing

Dallas police officer C.G. Watner testified at the June 29, 1978, hearing held on the defendant's motion to suppress that he responded to a 'major accident' call on January 5, 1978; that he arrived at the scene of a one car accident on Belt Line Road between Preston Road and Hillcrest in north Dallas; that a 1974 Oldsmobile converitble was against a brick wall on the north side of the road; that it appeared as though the Oldsmobile had struck a utility pole, verred off the road and had then come to rest against the wall; that the defendant was struggling with four fireman/ambulance attendants who were attempting to put him in an ambulance; that the defendant refused medical treatment whereupon Watner arrested him for public intoxication.

Watner testified that following the defendant's arrest he (Watner) asked the defendant to whom the Oldsmobile belonged and who was driving it, to which the defendant replied that it was his car and that he had been driving it.

Watner then testified that "according to state law" he had to impound the Oldsmobile and that under "city policy" he had to conduct an inventory of the Oldsmobile's contents. Watner stated that on the driver's side of the 60/40 front bench seat of the Oldsmobile he observed a medium size brown paper bag; that he opened such brown paper bag and found therein a plastic bag; that he opened the plastic bag and found therein a hand-rolled cigarette and a one inch square (1" x 1") folded piece of foil and found therein a substance which appeared to be "hash" – which is the basis of this case.

Watner testified that he opened the brown paper bag because he was looking for contraband; that he opened the plastic bag because he was looking for contraband; and that he opened the piece of foil because he was looking for contraband.

With regard to any Dallas police policies, directives and/or guidelines governing inventories of automobiles, Watner testified that such policies, directives and/or guidelines gave each officer total discretion as to the extent of the inventory taken of an automobile.

II

Authorities and Argument

A.

The State failed to establish Officer Watner's right to inventory the Oldsmobile's contents.

In Opperman v. South Dakota, 428 U.S. 364 (1976), the Supreme Court upheld the right of police to conduct inventories of impounded automobiles "pursuant to standard police procedures". *Id,* at 372. The State has failed to introduce any type of evidence, documentary or testimonial, that an inventory of an impounded automobile's contents is a standard procedure in Dallas, Texas. See and compare United States v. Hellman, 556 F.2d 442 (9th Cir. 1977), where the court of appeals noted that the Eugene, Oregon police department's Policy and Procedure Statement relating to impoundment of automobiles was introduced in the trial court. In *Hellman* the court held that because there was no evidence adduced to show that the inventory of the impounded vehicle was based on a locally followed practice, the *Opperman* requirement that the inventory be conducted pursuant to a standard police procedure was not satisfied. *Id,* at 444; and see the cases collated in footnote 3. In Robertson v. State, 541 S.W.2d 608 (Tex.Crim.App. 1976), the Court of Criminal Appeals specifically noted that "[i]t was stipulated and the record shows that the Houston Police Department required an inventory in such cases" in an opinion upholding an inventory search and seizure. Clearly the *Opperman* requirement was satisfied in *Robertson,* indicating that the Court of Criminal Appeals, like the Court of Appeals for the Ninth Circuit, insists upon proof that an inventory of automobiles is a locally followed routine practice and policy before the inventory of a particular vehicle will be upheld.

Under *Opperman* and *Robertson* the State was obliged to establish that the inventorying of impounded cars was a routine practice and policy of the Dallas police department in order to justify the inventory search of the Oldsmobile. The State simply failed to establish such threshold fact. Accordingly, Officer Watner's inventory search of the Oldsmobile was not authorized.

B.

To the extent Officer Watner testified that guidelines regarding inventory searches of impounded automobiles exist within the Dallas police department, his testimony clearly reveals that such guidelines allow each officer total discretion with regard to the extent of the inventory search. Such guidelines are contrary to the spirit and holding of *Opperman.* As noted in part A, above, *Opperman* requires that an inventory search, to be valid, be conducted "pursuant to standard police procedures". 428 U.S. at 372. This means that the routine practice and policy governing the inventory searching of impounded vehicles must not leave to the searching officer's discretion the scope or intensity of the search; otherwise, there is no *standard* procedure. Where, as in the case of the policy governing Dallas police officers inventory searching of impounded vehicles (as testified to by Officer Watner), each officer is given total discretion regarding the scope and intensity of an inventory search, there is no standard procedure and there is no routine practice.

The Dallas police department does not have a standard procedure governing inventories of impounded vehicles. There is no "locally followed routine practice and policy of [the Dallas] police department" respecting automobile inventory searches. Thus, there can never be any assurance based on such a locally followed routine practice and procedure that a particular car is not singled out by Dallas police officers for special searching attention. United States v. Hellman, *supra,* 556 F.2d at 444.

Moreover, to vest in individual police officers the absolute discretion whether to inventory an impounded vehicle's contents, and, if an inventory is made, to give officers total discretion regarding the scope and intensity of the inventory violates the due process requirement that police not be

given unbridled discretion in their decision to intrude upon a citizen's liberty. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 165-70 (1972); and Palmer v. City of Euclid, 402 U.S. 544 (1971).

C.

The sole purpose of an inventory of an impounded automobile is to secure and protect the car and its contents. South Dakota v. Opperman, 428 U.S. at 373. Such an inventory must therefore be limited in scope to the extent necessary to carry out the caretaking function of the police vis-a-vis the car which is in their custody. *Id,* at 374-75.

Where the inventory search is a "pretext concealing an investigatory police motive", *id,* at 376, the conduct of the police is unreasonable under the Fourth Amendment. United States v. Hellman, *supra,* 556 F.2d at 444. In this case, just as in *Hellman,* the testimony of the searching officer that he searched the brown paper bag and the plastic bag found in the paper bag, and the piece of foil found in the plastic bag because he was looking for contraband, makes it clear that the 'inventory' of the Oldsmobile's contents was done for "an investigatory police motive", and not in furtherance of the caretaking function of the police department. Accordingly, the seizure of the hash was unlawful and should be suppressed.

D.

Finally, Officer Watner's opening of the one inch square folded piece of foil cannot be justified as a part of an inventory of the Oldsmobile's contents. None of the cases – *Opperman* and *Robertson* – suggest that a police officer has the right to open closed containers found during an au-

tomobile inventory.[1] The purpose of an inventory is satisfied when police note the vehicle's contents and secure them by locking them in the trunk of the automobile.[2] Any opening of closed containers found in an impounded car is a search separate and apart from the inventory of the car's contents, which search, without constitutional probable, violates the Fourth Amendment. United States v. Chadwick, 433 U.S. 1, __ , 97 S.Ct. 2476, 2483-85, 53 L.Ed.2d 538, 548-50 (1977); United States v. Shye, 473 F.2d 1061, 1066 (6th Cir. 1973); United States v. Kroll, 481 F.2d 884, 886-87 (8th Cir. 1973). Officer Watner testified he did not believe the folded piece of foil contained anything of value about which he needed specific information for inventory purposes; in fact, Watner testifies he opened the foil because he suspected it contained drugs. Clearly the opening of the foil was a search unconnected to a legitimate need to inventory the Oldsmobile's contents, rendering the seizure of the hash found therein violative of the Fourth Amendment.

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[1] In *Opperman* and *Robertson* the contraband was found in plain view in the open glove compartment of the car.

[2] Officer Watner testified the Oldsmobile's trunk was locked when he first approached; that he unlocked it with the key furnished to him by the defendant; and that he re-locked it thereafter.

For the reasons stated above the defendant prays the Court grant his Motion to Suppress Evidence previously filed herein.

Respectfully submitted,

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By: MELVYN CARSON BRUDER

FILED
SEP 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-1711

* * *

JEFFREY ROBERT MALLEK,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For A Writ Of Certiorari To The Criminal District Court Number Two Of Dallas County, Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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On Petition For A Writ Of Certiorari
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* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

The State of Texas, Respondent herein, by and through the Attorney General of Texas, respectfully requests that the Court deny the Petition for a Writ of Certiorari, seeking review of an order of Criminal District Court Number Two of Dallas County, Texas, entered on October 13, 1978, which placed Petitioner on probation following his plea of not guilty to the felony offense of unlawful possession of a controlled substance and which deferred a final adjudication of Petitioner's guilt.

OPINION BELOW

There is no opinion by the court below, other than the

October 13th order, a copy of which may be found in Appendix A of the Petition for a Writ of Certiorari.

JURISDICTION

This Court does not have jurisdiction to review this case under 28 U.S.C. §1257 because the petition does not seek review of a final judgment or decree. *See* Part I, *infra*.

QUESTION PRESENTED

WHETHER THE HASHISH DISCOVERED BY THE POLICE OFFICERS WAS SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner asserts that the Fourth and Fourteenth Amendments to the United States Constitution are involved.

The jurisdictional issue raised by Respondent involves 28 U.S.C. §1257 and art. 42.12, §3d, Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

Following his indictment for the unlawful possession of hashish, Petitioner filed a motion to suppress evidence, arguing that the search of his automobile which yielded the hashish was in violation of the Fourth Amendment.

The only witness at the suppression hearing was one of the arresting officers who, along with his partner, was dispatched to the scene of a one-car accident in the early morning hours of January 5, 1978. Upon arriving at the scene of the accident, the officers encountered Petitioner, who was loudly protesting that he did not

want to be placed in an ambulance that already was at the scene. The officers, observing that Petitioner was drunk, arrested him for public intoxication and placed him in the back seat of the patrol car. Answering the officers' inquiry, Petitioner indicated that the disabled car involved in the accident was his.

Since the car was disabled and there was no one present to whom the officers could release it, a city wrecker was called in to impound the car, so that the officers could fulfill their statutory duty to keep the public streets clear. Art. 6701d, §§27(a)(10) and 94(c)(5), Vernon's Tex.Civ.Stat.Ann.; §28-4(a)(5), Dallas City Ordinance (1978). Before the car was hauled away, however, the officers performed an inventory search of the automobile.

Pursuant to a city policy of Dallas, embodied in general orders issued by the city's chief of police, such an inventory search is performed every time a wrecker is brought in to impound an automobile. The contents of the automobile are noted on the accident report form prepared by the officer, and later this information is transferred to a "pound" book which indicates the contents of and extent of any damage to automobiles brought into the city impoundment yard. Although the city's policy leaves the officers in the field with some limited discretion about the extent of inventory searches, the police officer in the instant case testified that he generally conducted a very thorough search, primarily to protect himself and the wrecker driver from any later charges of theft should items be missing from the car.

The inventory search initially revealed phonograph albums scattered in the back seat of Petitioner's car. Then, between the two front seats but close to the driver's side, the officers saw in plain view a medium-sized brown paper bag and, through a rip in the bag, a

plastic bag inside. Inside the plastic bag, the officers noted a hand-rolled marijuana cigarette and a package of aluminum foil, folded into an inch square. Opening the tinfoil to note its contents, the officers found the hashish. Subsequently, Petitioner was charged with its unlawful possession.

Following the trial court's denial of the motion to suppress, Petitioner waived his right to jury trial and pleaded not guilty. The judge then entered an order indicating that the evidence substantiated Petitioner's guilt and placing Petitioner on probation for two years. Significantly, the court did not enter a final adjudication of guilt. Petitioner did not appeal to the Texas Court of Criminal Appeals. Furthermore, since the deferred adjudication order, Petitioner has not gone before the trial court to seek a final adjudication of his criminal proceeding and, in fact, no final adjudication has been made.

The deferred adjudication order was entered on October 13, 1978. On January 15, 1979, Petitioner submitted an as yet unruled upon motion for extension of time in which to file his petition with this Court, seeking an extension until March 8, 1979. On April 27, 1979, the petition was filed.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

There Being No Final Judgment Or Decree, This Court Does Not Have Jurisdiction Under 28 U.S.C. §1257 To Exercise Its Power Of Review

Under 28 U.S.C. §1257, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

Court...." No final judgment or decree has been rendered by a Texas court against Petitioner and, therefore, this Court lacks jurisdiction to address the issue raised by him.

As Petitioner concedes, *see* Petition for Writ of Certiorari at 4, and as the October 13th order which Petitioner seeks to have reviewed makes clear, Petitioner has never been adjudged guilty of the offense of unlawful possession of the hashish seized during the inventory search of his car. Instead, a final adjudication of Petitioner's guilt has been deferred under the provisions of art. 42.12, §3d(a), Texas Code of Criminal Procedure, and he has been placed on two years probation.

When the probationary period has expired, if the Court has not in the meantime adjudged Petitioner guilty, "the court shall dismiss the proceedings against the defendant and discharge him." Art 42.12, §3d(c), Tex.C.Crim.Proc. That same section also permits a judge to dismiss proceedings and discharge a defendant such as Petitioner earlier if it would be in best interests of both society and the defendant. "A dismissal or discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense...," with one exception not relevant here. *Id.* In short, at this time Petitioner does not stand convicted of the offense with which he was charged, and, unless he violates a condition of probation, he will never stand convicted of it.[1]

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[1]The state trial court's deferred adjudication proceeding does not appear to have fully complied with state law. The October 13th order recites that Petitioner pleaded not guilty, yet the deferred adjudication method of avoiding entry of a conviction, by the terms of §3d(a) of the statute, is not supposed to be available to a criminal defendant unless he pleads guilty. This problem, however, has no effect on the finality issue.

Although Petitioner under §3d(a), Tex.C.Crim.Proc., had available a method for obtaining a final adjudication of his case -- by filing a written motion seeking final adjudication within thirty days of the deferred adjudication order -- he never availed himself of it. Instead, without seeking an adjudication of guilt, without receiving an adjudication of guilt, and without having traveled through the normal Texas criminal appellate process which was available to him had he only sought it, the Petitioner now comes to this Court for a review of his constitutional claim. The jurisdictional doctrine of finality embodied in 28 U.S.C. §1257 prohibits such review.

Petitioner admits that he could not appeal the deferred adjudication order to the Texas Court of Criminal Appeals. Before such an appeal may be taken, a judgment meeting the requirements of art. 42.01, Tex.C.Crim.Proc., is necessary, *Tyra v. State*, 548 S.W.2d 912 (Tex.Crim.App. 1977), and one of the requirements of art. 42.01 is that the defendant have either been adjudged guilty or discharged. *See* art. 42.01, §1(10); *Savant v. State*, 535 S.W.2d 190 (Tex.Crim.App. 1976). Such has not occurred in this case and, therefore, under Texas law there is no final judgment.

Likewise, there is no final judgment or decree for purposes of this Court's jurisdiction. Sentence and judgment have never been imposed upon Petitioner and, without these, the finality requirement has not been met. *Parr v. United States*, 351 U.S. 513, 518 (1956); *Berman v. United States*, 302 U.S. 211 (1937). Until and unless sentence and judgment are imposed upon Petitioner, he will suffer none of the disabilities that convicted felons suffer, *see* art. 42.12, §3d(c); yet, a convicted felon's being subjected to such disability is a prime ingredient imparting finality into a criminal proceeding. *Berman v. United States, supra*, 302 U.S. at 13.

In essence, Petitioner is seeking to avoid the finality requirement and have this Court review, without the benefit of a fully developed trial record, the denial of his motion to suppress. The Court has previously refused to assert jurisdiction and sanction this piecemeal approach to appellate criminal procedure, *Chapman v. California*, 405 U.S. 1020 (1972), and it should do so again.

II.

The Hashish Discovered By The Police Officers During The Inventory Search Of Petitioner's Automobile Was Not Seized In Violation Of The Fourth And Fourteenth Amendments To The United States Constitution

Petitioner challenges the constitutional validity of the police officers' seizure of the hashish during an inventory search of his car and argues that seizure was not in compliance with the guidelines of *South Dakota v. Opperman*, 428 U.S. 364 (1976),[2] for four basic reasons: (a) because there was no evidence of a Dallas police department policy for inventory searches of impounded vehicles; (b) because even if there was such a policy, it permitted the police officers too much discretion; (c) because the search exceeded the permissible bounds of an inventory search; and (d) because the search of the aluminum foil package was pretextual. The Fourth Amendment as explicated in *Opperman* was violated in none of these respects.

Petitioner's argument that there is no evidence of a policy for inventory searches borders on the frivolous. The only witness at the suppression hearing was a Dallas police officer who testified that disabled cars at

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[2]At several points in the petition, Petitioner refers to Chief Justice Burger's *Opperman* opinion as a plurality opinion. It is not. It is an opinion for the Court, joined by four other Justices.

the scene of an accident are as a matter of course impounded to further the state law requirements of keeping the public streets clear. (SF 12, 28-29).[3] Throughout his testimony, both during direct and cross examination, the officer testified that the police department's policy was to conduct an inventory search of vehicles so impounded. (SF 14, 29-31, 33-34). Despite this extensive and unrefuted testimonial evidence, Petitioner argues that the existence of an inventory search policy has not been established because no *written* policy was introduced into evidence. Nothing in *Opperman* remotely suggests that only written policies suffice to insulate inventory searches from invalidity under the Fourth Amendment or that the Fourth Amendment imposes upon the state the hypertechnical evidentiary necessity of introducing into evidence at suppression hearings such written policies. The officer's unrefuted testimony suffices to establish the policy.

Next, Petitioner argues that, even if there was a policy, too much discretion was given the officers in the field in determining the scope of the inventory search. Again, nothing in *Opperman* imposes upon police departments the duty of establishing policies that rigidly require that only certain items in a vehicle be inventoried. While *Opperman* might be read to require that only a limited discretion may be exercised in determining *which* impounded cars to inventory, *see, e.g., United States v. Hellman*, 556 F.2d 442, 445 (9th Cir. 1977) (Sneed, J., concurring), this aspect of *Opperman* is not at issue here. There is no evidence that Dallas police officers have discretion in determining which impounded cars to inventory. The only testimony about discretion relates to a limited discretion placed in police officers as to the thoroughness of the inventory that they conduct. (SF 34-36). Limited discretion as to the extent

[3]"SF" refers to the transcript, or Statement of Facts, of the suppression hearing.

of an inventory search, as opposed to discretion over whether to conduct one at all, is a necessity since policies, by definition, are simply general guidelines. The items to be inventoried necessarily vary from case to case and cannot and should not be specified in advance by policy guidelines. Otherwise, one of the basic purposes of inventory searches -- protection of the officers from charges of theft, *see Opperman*, 428 U.S. at 369 -- would be undercut, since a detailed policy might very well omit one or several of the infinite variety in the types of personalty that might be found in cars.

The inventory search in this case clearly did not exceed the permissible bounds of an inventory search. The brown paper bag in which the hashish was found was in plain view near the driver's seat of Petitioner's car. To ensure that all readily removable items of personalty were inventoried so that any valuables of Petitioner's could be noted, *see Opperman, id.*, and so that the officers could be protected against the subsequent charges of pilferage, *id.*, it was necessary to itemize the contents of the bag, including what was contained in the aluminum foil package. Any less detailed itemization would make the inventory search a meaningless gesture. Additionally, such an inventory search of an item in plain view is certainly less intrusive than those that this Court has approved in *Opperman* (glove compartment), *Cady v. Dombrowski*, 413 U.S. 433 (1973) (car trunk), and *Cooper v. California*, 386 U.S. 58 (1967) (glove compartment).

Because an itemized listing of the contents of the brown paper bag, including whatever might have been wrapped in the aluminum foil package, was necessary to serve the purposes of an inventory search as approved in *Opperman*, Petitioner's argument that the search was pretextual and therefore invalid carries no weight. That during the inventory search the officer serendipitously discovered an item he thought might be contraband

means nothing. The search clearly was initiated as an inventory search and concluded as one, despite the fact that contraband happened to be one of the items inventoried. *Opperman* does not require the irrational result that an officer inventory only non-contraband items, leaving unlisted any items he thinks might be contraband.

The inventory search in this case was in full compliance with *Opperman*, and Petitioner's attempt to have the Court impose hypertechnical refinements of the *Opperman* guidelines having no relationship to the policies underlying those guidelines does not merit consideration.

III.

Since The Petition Was Not Filed Within The Time Limits Established By Rule 22(1), Rules Of The United States Supreme Court, This Court Should Refuse To Exercise Its Discretionary Powers of Review

This petition was not filed in a timely manner and, therefore, should not be considered by the Court.

Under Rule 22(1) of the rules of the Court, Petitioner had ninety days after the entry of the October 13, 1978, order to file his petition for a writ of certiorari with the Clerk of the Court.[4] For good cause shown, a Justice of the Court could extend this time limit for a period not exceeding sixty days. Therefore, absent an extension, Petitioner had until January 11, 1979, in which to file his petition and, with an extension, until March 12, 1979.

Petitioner did not even file a motion for extension of time until January 15, 1979, and in that motion, which has not been ruled upon, he sought an extension until

[4]This order is not a final judgment. *See* Part I, *supra*.

March 8, 1979. His petition was not ultimately filed until April 27, 1979 -- forty-six days after the latest date he could have filed under Rule 22(1) and fifty days after the date he had sought for his deadline. The Court should not condone such tardiness through exercising its discretionary powers under 28 U.S.C. §1257(3) to review this case.

CONCLUSION

Wherefore, for the reasons above stated, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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